

Y2K ACT

JUNE 29, 1999.—Ordered to be printed

Mr. HYDE, from the committee of conference,
submitted the following

CONFERENCE REPORT

[To accompany H.R. 775]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 775), to establish certain procedures for civil actions brought for damages relating to the failure of any device or system to process or otherwise deal with the transition from the year 1999 to the year 2000, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment, insert the following:

SECTION 1. SHORT TITLE; TABLE OF SECTIONS.

(a) *SHORT TITLE.*—*This Act may be cited as the “Y2K Act”.*

(b) *TABLE OF SECTIONS.*—*The table of sections for this Act is as follows:*

Sec. 1. Short title; table of sections.

Sec. 2. Findings and purposes.

Sec. 3. Definitions.

Sec. 4. Application of Act.

Sec. 5. Punitive damages limitations.

Sec. 6. Proportionate liability.

Sec. 7. Prolitigation notice.

Sec. 8. Pleading requirements.

Sec. 9. Duty to mitigate.

Sec. 10. Application of existing impossibility or commercial impracticability doctrines.

Sec. 11. Damages limitation by contract.

Sec. 12. Damages in tort claims.

Sec. 13. State of mind; bystander liability; control.

Sec. 14. Appointment of special masters or magistrate judges for Y2K actions.

Sec. 15. Y2K actions as class actions.

Sec. 16. Applicability of State law.

Sec. 17. Admissible evidence ultimate issue in State courts.

Sec. 18. Suspension of penalties for certain year 2000 failures by small business concerns.

SEC. 2. FINDINGS AND PURPOSES.

(a) *FINDINGS.*—The Congress finds the following:

(1)(A) Many information technology systems, devices, and programs are not capable of recognizing certain dates in 1999 and after December 31, 1999, and will read dates in the year 2000 and thereafter as if those dates represent the year 1900 or thereafter or will fail to process dates after December 31, 1999.

(B) If not corrected, the problem described in subparagraph (A) and resulting failures could incapacitate systems that are essential to the functioning of markets, commerce, consumer products, utilities, Government, and safety and defense systems, in the United States and throughout the world.

(2) It is in the national interest that producers and users of technology products concentrate their attention and resources in the time remaining before January 1, 2000, on assessing, fixing, testing, and developing contingency plans to address any and all outstanding year 2000 computer date-change problems, so as to minimize possible disruptions associated with computer failures.

(3)(A) Because year 2000 computer date-change problems may affect virtually all businesses and other users of technology products to some degree, there is a substantial likelihood that actual or potential year 2000 failures will prompt a significant volume of litigation, much of it insubstantial.

(B) The litigation described in subparagraph (A) would have a range of undesirable effects, including the following:

(i) It would threaten to waste technical and financial resources that are better devoted to curing year 2000 computer date-change problems and ensuring that systems remain or become operational.

(ii) It could threaten the network of valued and trusted business and customer relationships that are important to the effective functioning of the national economy.

(iii) It would strain the Nation's legal system, causing particular problems for the small businesses and individuals who already find that system inaccessible because of its complexity and expense.

(iv) The delays, expense, uncertainties, loss of control, adverse publicity, and animosities that frequently accompany litigation of business disputes could exacerbate the difficulties associated with the date change and work against the successful resolution of those difficulties.

(4) It is appropriate for the Congress to enact legislation to assure that the year 2000 problems described in this section do not unnecessarily disrupt interstate commerce or create unnecessary caseloads in Federal courts and to provide initiatives to help businesses prepare and be in a position to withstand the potentially devastating economic impact of such problems.

(5) Resorting to the legal system for resolution of year 2000 problems described in this section is not feasible for many busi-

nesses and individuals who already find the legal system inaccessible, particularly small businesses and individuals who already find the legal system inaccessible, because of its complexity and expense.

(6) Concern about the potential for liability—in particular, concern about the substantial litigation expense associated with defending against even the most insubstantial lawsuits—is prompting many persons and businesses with technical expertise to avoid projects aimed at curing year 2000 computer date-change problems.

(7) A proliferation of frivolous lawsuits relating to year 2000 computer date-change problems by opportunistic parties may further limit access to courts by straining the resources of the legal system and depriving deserving parties of their legitimate rights to relief.

(8) Congress encourages businesses to approach their disputes relating to year 2000 computer date-change problems responsibly, and to avoid unnecessary, time-consuming, and costly litigation about Y2K failures, particularly those that are not material. Congress supports good faith negotiations between parties when there is such a dispute, and, if necessary, urges the parties to enter into voluntary, non-binding mediation rather than litigation.

(b) **PURPOSES.**—Based upon the power of the Congress under Article I, Section 8, Clause 3 of the Constitution of the United States, the purposes of this Act are—

(1) to establish uniform legal standards that give all businesses and users of technology products reasonable incentives to solve year 2000 computer date-change problems before they develop;

(2) to encourage continued remediation and testing efforts to solve such problems by providers, suppliers, customers, and other contracting partners;

(3) to encourage private and public parties alike to resolve disputes relating to year 2000 computer date-change problems by alternative dispute mechanisms in order to avoid costly and time-consuming litigation, to initiate those mechanisms as early as possible, and to encourage the prompt identification and correction of such problems; and

(4) to lessen the burdens on interstate commerce by discouraging insubstantial lawsuits while preserving the ability of individuals and businesses that have suffered real injury to obtain complete relief.

SEC. 3. DEFINITIONS.

In this Act:

(1) **Y2K ACTION.**—The term “Y2K action”—

(A) means a civil action commenced in any Federal or State court, or an agency board of contract appeal proceeding, in which the plaintiff’s alleged harm or injury arises from or is related to an actual or potential Y2K failure, or a claim or defense arises from or is related to an actual or potential Y2K failure;

(B) includes a civil action commenced in any Federal or State court by a government entity when acting in a commercial or contracting capacity; but

(C) does not include an action brought by a government entity acting in a regulatory, supervisory, or enforcement capacity.

(2) *Y2K FAILURE.*—The term “Y2K failure” means failure by any device or system (including any computer system and any microchip or integrated circuit embedded in another device or product), or any software, firmware, or other set or collection of processing instructions to process, to calculate, to compare, to sequence, to display, to store, to transmit, or to receive year-2000 date-related data, including failures—

(A) to deal with or account for transitions or comparisons from, into, and between the years 1999 and 2000 accurately;

(B) to recognize or accurately to process any specific date in 1999, 2000, or 2001; or

(C) accurately to account for the year 2000’s status as a leap year, including recognition and processing of the correct date on February 29, 2000.

(3) *GOVERNMENT ENTITY.*—The term “government entity” means an agency, instrumentality, or other entity of Federal, State, or local government (including multijurisdictional agencies, instrumentalities, and entities).

(4) *MATERIAL DEFECT.*—The term “material defect” means a defect in any item, whether tangible or intangible, or in the provision of a service, that substantially prevents the item or service from operating or functioning as designed or according to its specifications. The term “material defect” does not include a defect that—

(A) has an insignificant or de minimis effect on the operation or functioning of an item or computer program;

(B) affects only a component of an item or program that, as a whole, substantially operates or functions as designed; or

(C) has an insignificant or de minimis effect on the efficacy of the service provided.

(5) *PERSONAL INJURY.*—The term “personal injury” means physical injury to a natural person, including—

(A) death as a result of a physical injury; and

(B) mental suffering, emotional distress, or similar injuries suffered by that person in connection with a physical injury.

(6) *STATE.*—The term “State” means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Northern Mariana Islands, the United States Virgin Islands, Guam, American Samoa, and any other territory or possession of the United States, and any political subdivision thereof.

(7) *CONTRACT.*—The term “contract” means a contract, tariff, license, or warranty.

(8) *ALTERNATIVE DISPUTE RESOLUTION.*—The term “alternative dispute resolution” means any process or proceeding,

other than adjudication by a court or in an administrative proceeding, to assist in the resolution of issues in controversy, through processes such as early neutral evaluation, mediation, minitrial, and arbitration.

SEC. 4. APPLICATION OF ACT.

(a) **GENERAL RULE.**—*This Act applies to any Y2K action brought after January 1, 1999, for a Y2K failure occurring before January 1, 2003, or for a potential Y2K failure that could occur or has allegedly caused harm or injury before January 1, 2003, including any appeal, remand, stay, or other judicial, administrative, or alternative dispute resolution proceeding in such an action.*

(b) **NO NEW CAUSE OF ACTION CREATED.**—*Nothing in this Act creates a new cause of action, and, except as otherwise explicitly provided in this Act, nothing in this Act expands any liability otherwise imposed or limits any defense otherwise available under Federal or State law.*

(c) **CLAIMS FOR PERSONAL INJURY OR WRONGFUL DEATH EXCLUDED.**—*This Act does not apply to a claim for personal injury or for wrongful death.*

(d) **WARRANTY AND CONTRACT PRESERVATION.**—

(1) **IN GENERAL.**—*Subject to paragraph (2), in any Y2K action any written contractual term, including a limitation or an exclusion of liability, or a disclaimer of warranty, shall be strictly enforced unless the enforcement of that term would manifestly and directly contravene applicable State law embodied in any statute in effect on January 1, 1999, specifically addressing that term.*

(2) **INTERPRETATION OF CONTRACT.**—*In any Y2K action in which a contract to which paragraph (1) applies is silent as to a particular issue, the interpretation of the contract as to that issue shall be determined by applicable law in effect at the time the contract was executed.*

(3) **UNCONSCIONABILITY.**—*Nothing in paragraph (1) shall prevent enforcement of State law doctrines of unconscionability, including adhesion, recognized as of January 1, 1999, in controlling judicial precedent by the courts of the State whose law applies to the Y2K action.*

(e) **PREEMPTION OF STATE LAW.**—*This Act supersedes State law to the extent that it establishes a rule of law applicable to a Y2K action that is inconsistent with State law, but nothing in this Act implicates, alters, or diminishes the ability of a State to defend itself against any claim on the basis of sovereign immunity.*

(f) **APPLICATION WITH YEAR 2000 INFORMATION AND READINESS DISCLOSURE ACT.**—*Nothing in this Act supersedes any provision of the Year 2000 Information and Readiness Disclosure Act.*

(g) **APPLICATION TO ACTIONS BROUGHT BY A GOVERNMENT ENTITY.**—

(1) **IN GENERAL.**—*To the extent provided in this subsection, this Act shall apply to an action brought by a government entity described in section 3(1)(C).*

(2) **DEFINITIONS.**—*In this subsection:*

(A) **DEFENDANT.**—

(i) **IN GENERAL.**—*The term “defendant” includes a State or local government.*

(ii) *STATE*.—The term “State” means each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

(iii) *LOCAL GOVERNMENT*.—The term “local government” means—

(I) any county, city, town, township, parish, village, or other general purpose political subdivision of a State; and

(II) any combination of political subdivisions described in subclause (I) recognized by the Secretary of Housing and Urban Development.

(B) *Y2K UPSET*.—The term “Y2K upset”—

(i) means an exceptional temporary noncompliance with applicable Federally enforceable measurement, monitoring, or reporting requirements directly related to a Y2K failure that are beyond the reasonable control of the defendant charged with compliance; and

(ii) does not include—

(I) noncompliance with applicable Federally enforceable measurement, monitoring, or reporting requirements that constitutes or would create an imminent threat to public health, safety, or the environment;

(II) noncompliance with applicable Federally enforceable measurement, monitoring, or reporting requirements that provided for the safety and soundness of the banking or monetary system, or for the integrity of the national securities markets, including the protection of depositors and investors;

(III) noncompliance with applicable Federally enforceable measurement, monitoring, or reporting requirements to the extent caused by operational error or negligence;

(IV) lack of reasonable preventative maintenance;

(V) lack of preparedness for a Y2K failure; or

(VI) noncompliance with the underlying Federally enforceable requirements to which the applicable Federally enforceable measurement, monitoring, or reporting requirement relates.

(3) *CONDITIONS NECESSARY FOR A DEMONSTRATION OF A Y2K UPSET*.—A defendant who wishes to establish the affirmative defense of Y2K upset shall demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that—

(A) the defendant previously made a reasonable good faith effort to anticipate, prevent, and effectively remediate a potential Y2K failure;

(B) a Y2K upset occurred as a result of a Y2K failure or other emergency directly related to a Y2K failure;

(C) noncompliance with the applicable Federally enforceable measurement, monitoring, or reporting requirement was unavoidable in the face of an emergency directly related to a Y2K failure and was necessary to prevent the disruption of critical functions or services that could result in harm to life or property;

(D) upon identification of noncompliance the defendant invoking the defense began immediate actions to correct any violation of Federally enforceable measurement, monitoring, or reporting requirements; and

(E) the defendant submitted notice to the appropriate Federal regulatory authority of a Y2K upset within 72 hours from the time that the defendant became aware of the upset.

(4) GRANT OF A Y2K UPSET DEFENSE.—Subject to the other provisions of this subsection, the Y2K upset defense shall be a complete defense to the imposition of a penalty in any action brought as a result of noncompliance with Federally enforceable measurement, monitoring, or reporting requirements for any defendant who establishes by a preponderance of the evidence that the conditions set forth in paragraph (3) are met.

(5) LENGTH OF Y2K UPSET.—The maximum allowable length of the Y2K upset shall be not more than 15 days beginning on the date of the upset unless specific relief by the appropriate regulatory authority is granted.

(6) FRAUDULENT INVOCATION OF Y2K UPSET DEFENSE.—Fraudulent use of the Y2K upset defense provided for in this subsection shall be subject to the sanctions provided in section 1001 of title 18, United States Code.

(7) EXPIRATION OF DEFENSE.—The Y2K upset defense may not be asserted for a Y2K upset occurring after June 30, 2000.

(8) PRESERVATION OF AUTHORITY.—Nothing in this subsection shall affect the authority of a government entity to seek injunctive relief or require a defendant to correct a violation of a Federal enforceable measurement, monitoring, or reporting requirement.

(h) CONSUMER PROTECTION FROM Y2K FAILURES.—

(1) IN GENERAL.—No person who transacts business on matters directly or indirectly affecting residential mortgages shall cause or permit a foreclosure on any such mortgage against a consumer as a result of an actual Y2K failure that results in an inability accurately or timely to process any mortgage payment transaction.

(2) NOTICE.—A consumer who is affected by an inability described in paragraph (1) shall notify the servicer for the mortgage, in writing and within 7 business days from the time that the consumer becomes aware of the Y2K failure and the consumer's inability accurately or timely to fulfill his or her obligation to pay, of such failure and inability and shall provide to the servicer any available documentation with respect to the failure.

(3) ACTIONS MAY RESUME AFTER GRACE PERIOD.—Notwithstanding paragraph (1), an action prohibited under paragraph (1) may be resumed, if the consumer's mortgage obligation has

not been paid and the servicer of the mortgage has not expressly and in writing granted the consumer an extension of time during which to pay the consumer's mortgage obligation, but only after the later of—

(A) 4 weeks after January 1, 2000; or

(B) 4 weeks after notification is made as required under paragraph (2), except that any notification made on or after March 15, 2000, shall not be effective for purposes of this subsection.

(4) **APPLICABILITY.**—This subsection does not apply to transactions upon which a default has occurred before December 15, 1999, or with respect to which an imminent default was foreseeable before December 15, 1999.

(5) **ENFORCEMENT OF OBLIGATIONS MERELY TOLLED.**—This subsection delays but does not prevent the enforcement of financial obligations, and does not otherwise affect or extinguish the obligation to pay.

(6) **DEFINITION.**—In this subsection—

(A) The term “consumer” means a natural person.

(B) The term “residential mortgage” has the meaning given the term “federally related mortgage loan” under section 3 of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2602).

(C) The term “servicer” means the person, including any successor, responsible for receiving any scheduled periodic payments from a consumer pursuant to the terms of a residential mortgage, including amounts for any escrow account, and for making the payments of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the mortgage. Such term includes the person, including any successor, who makes or holds a loan if such person also services the loan.

(i) **APPLICABILITY TO SECURITIES LITIGATION.**—In any Y2K action in which the underlying claim arises under the securities laws (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)), the provisions of this Act, other than section 13(b) of this Act, shall not apply.

SEC. 5. PUNITIVE DAMAGES LIMITATIONS.

(a) **IN GENERAL.**—In any Y2K action in which punitive damages are permitted by applicable law, the defendant shall not be liable for punitive damages unless the plaintiff proves by clear and convincing evidence that the applicable standard for awarding damages has been met.

(b) **CAPS ON PUNITIVE DAMAGES.**—

(1) **IN GENERAL.**—Subject to the evidentiary standard established by subsection (a), punitive damages permitted under applicable law against a defendant described in paragraph (2) in a Y2K action may not exceed the lesser of—

(A) 3 times the amount awarded for compensatory damages; or

(B) \$250,000.

(2) **DEFENDANT DESCRIBED.**—A defendant described in this paragraph is a defendant—

(A) *who—*

(i) *is sued in his or her capacity as an individual; and*

(ii) *whose net worth does not exceed \$500,000; or*

(B) *that is an unincorporated business, a partnership, corporation, association, or organization, with fewer than 50 full-time employees.*

(3) *NO CAP IF INJURY SPECIFICALLY INTENDED.—Paragraph (1) does not apply if the plaintiff establishes by clear and convincing evidence that the defendant acted with specific intent to injure the plaintiff.*

(c) *GOVERNMENT ENTITIES.—Punitive damages in a Y2K action may not be awarded against a government entity.*

SEC. 6. PROPORTIONATE LIABILITY.

(a) *IN GENERAL.—Except in a Y2K action that is a contract action, and except as provided in subsections (b) through (g), a person against whom a final judgment is entered in a Y2K action shall be liable solely for the portion of the judgment that corresponds to the relative and proportionate responsibility of that person. In determining the percentage of responsibility of any defendant, the trier of fact shall determine that percentage as a percentage of the total fault of all persons, including the plaintiff, who caused or contributed to the total loss incurred by the plaintiff.*

(b) *PROPORTIONATE LIABILITY.—*

(1) *DETERMINATION OF RESPONSIBILITY.—In any Y2K action that is not a contract action, the court shall instruct the jury to answer special interrogatories, or, if there is no jury, the court shall make findings with respect to each defendant, including defendants who have entered into settlements with the plaintiff or plaintiffs, concerning—*

(A) *the percentage of responsibility, if any, of each defendant, measured as a percentage of the total fault of all persons who caused or contributed to the loss incurred by the plaintiff; and*

(B) *if alleged by the plaintiff, whether the defendant (other than a defendant who has entered into a settlement agreement with the plaintiff)—*

(i) *acted with specific intent to injure the plaintiff;*

or

(ii) *knowingly committed fraud.*

(2) *CONTENTS OF SPECIAL INTERROGATORIES OR FINDINGS.—The responses to interrogatories or findings under paragraph (1) shall specify the total amount of damages that the plaintiff is entitled to recover and the percentage of responsibility of each defendant found to have caused or contributed to the loss incurred by the plaintiff.*

(3) *FACTORS FOR CONSIDERATION.—In determining the percentage of responsibility under this subsection, the trier of fact shall consider—*

(A) *the nature of the conduct of each person found to have caused or contributed to the loss incurred by the plaintiff; and*

(B) the nature and extent of the causal relationship between the conduct of each such person and the damages incurred by the plaintiff.

(c) *JOINT LIABILITY FOR SPECIFIC INTENT OR FRAUD.*—

(1) *IN GENERAL.*—Notwithstanding subsection (a), the liability of a defendant in a Y2K action that is not a contract action is joint and several if the trier of fact specifically determines that the defendant—

- (A) acted with specific intent to injure the plaintiff; or
- (B) knowingly committed fraud.

(2) *FRAUD; RECKLESSNESS.*—

(A) *KNOWING COMMISSION OF FRAUD DESCRIBED.*—For purposes of subsection (b)(1)(B)(ii) and paragraph (1)(B) of this subsection, a defendant knowingly committed fraud if the defendant—

(i) made an untrue statement of a material fact, with actual knowledge that the statement was false;

(ii) omitted a fact necessary to make the statement not be misleading, with actual knowledge that, as a result of the omission, the statement was false; and

(iii) knew that the plaintiff was reasonably likely to rely on the false statement.

(B) *RECKLESSNESS.*—For purposes of subsection (b)(1)(B) and paragraph (1) of this subsection, reckless conduct by the defendant does not constitute either a specific intent to injure, or the knowing commission of fraud, by the defendant.

(3) *RIGHT TO CONTRIBUTION NOT AFFECTED.*—Nothing in this section affects the right, under any other law, of a defendant to contribution with respect to another defendant found under subsection (b)(1)(B), or determined under paragraph (1)(B) of this subsection, to have acted with specific intent to injure the plaintiff or to have knowingly committed fraud.

(d) *SPECIAL RULES.*—

(1) *UNCOLLECTIBLE SHARE.*—

(A) *IN GENERAL.*—Notwithstanding subsection (a), if, upon motion made not later than 6 months after a final judgment is entered in any Y2K action that is not a contract action, the court determines that all or part of the share of the judgment against a defendant for compensatory damages is not collectible against that defendant, then each other defendant in the action is liable for the uncollectible share as follows:

(i) *PERCENTAGE OF NET WORTH.*—The other defendants are jointly and severally liable for the uncollectible share if the plaintiff establishes that—

(I) the plaintiff is an individual whose recoverable damages under the final judgment are equal to more than 10 percent of the net worth of the plaintiff; and

(II) the net worth of the plaintiff is less than \$200,000.

(ii) *OTHER PLAINTIFFS.*—For a plaintiff not described in clause (i), each of the other defendants is lia-

ble for the uncollectible share in proportion to the percentage of responsibility of that defendant.

(iii) For a plaintiff not described in clause (i), in addition to the share indentified in clause (ii), the defendant is liable for an additional portion of the uncollectible share in an amount equal to 50 percent of the amount determined under clause (ii) if the plaintiff demonstrates by a preponderance of the evidence that the defendant acted with reckless disregard for the likelihood that its acts would cause injury of the sort suffered by the plaintiff.

(B) *OVERALL LIMIT.*—The total payments required under subparagraph (A) from all defendants may not exceed the amount of the uncollectible share.

(C) *SUBJECT TO CONTRIBUTION.*—A defendant against whom judgment is not collectible is subject to contribution and to any continuing liability to the plaintiff on the judgment.

(D) *SUITS BY CONSUMERS.*—

(i) Notwithstanding subparagraph (A), the other defendants are jointly and severally liable for the uncollectible share if—

(I) the plaintiff is a consumer whose suit alleges or arises out of a defect in a consumer product; and

(II) the plaintiff is suing as an individual and not as part of a class action.

(ii) In this subparagraph:

(I) The term “class action” means—

(aa) a single lawsuit in which (1) damages are sought on behalf of more than 10 persons or prospective class members; or (2) 1 or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated; or

(bb) any group of lawsuits filed in or pending in the same court in which (1) damages are sought on behalf of more than 10 persons; and (2) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

(II) The term “consumer” means an individual who acquires a consumer product for purposes other than resale.

(III) The term “consumer product” means any personal property or service which is normally used for personal, family, or household purposes.

(2) *SPECIAL RIGHT OF CONTRIBUTION.*—To the extent that a defendant is required to make an additional payment under paragraph (1), that defendant may recover contribution—

(A) from the defendant originally liable to make the payment;

(B) from any other defendant that is jointly and severally liable;

(C) from any other defendant held proportionately liable who is liable to make the same payment and has paid less than that other defendant's proportionate share of that payment; or

(D) from any other person responsible for the conduct giving rise to the payment that would have been liable to make the same payment.

(3) *NONDISCLOSURE TO JURY.*—The standard for allocation of damages under subsection (a) and subsection (b)(1), and the procedure for reallocation of uncollectible shares under paragraph (1) of this subsection, shall not be disclosed to members of the jury.

(e) *SETTLEMENT DISCHARGE.*—

(1) *IN GENERAL.*—A defendant who settles a Y2K action that is not a contract action at any time before final verdict or judgment shall be discharged from all claims for contribution brought by other persons. Upon entry of the settlement by the court, the court shall enter an order constituting the final discharge of all obligations to the plaintiff of the settling defendant arising out of the action. The order shall bar all future claims for contribution arising out of the action—

(A) by any person against the settling defendant; and

(B) by the settling defendant against any person other than a person whose liability has been extinguished by the settlement of the settling defendant.

(2) *REDUCTION.*—If a defendant enters into a settlement with the plaintiff before the final verdict or judgment, the verdict or judgment shall be reduced by the greater of—

(A) an amount that corresponds to the percentage of responsibility of that defendant; or

(B) the amount paid to the plaintiff by that defendant.

(f) *GENERAL RIGHT OF CONTRIBUTION.*—

(1) *IN GENERAL.*—A defendant who is jointly and severally liable for damages in any Y2K action that is not a contract action may recover contribution from any other person who, if joined in the original action, would have been liable for the same damages. A claim for contribution shall be determined based on the percentage of responsibility of the claimant and of each person against whom a claim for contribution is made.

(2) *STATUTE OF LIMITATIONS FOR CONTRIBUTION.*—An action for contribution in connection with a Y2K action that is not a contract action shall be brought not later than 6 months after the entry of a final, nonappealable judgment in the Y2K action, except that an action for contribution brought by a defendant who was required to make an additional payment under subsection (d)(1) may be brought not later than 6 months after the date on which such payment was made.

(g) *MORE PROTECTIVE STATE LAW NOT PREEMPTED.*—Nothing in this section preempts or supersedes any provision of State law that—

(1) *limits the liability of a defendant in a Y2K action to a lesser amount than the amount determined under this section; or*

(2) *otherwise affords a greater degree of protection from joint or several liability than is afforded by this section.*

SEC. 7. PRELITIGATION NOTICE.

(a) *IN GENERAL.*—Before commencing a Y2K action, except an action that seeks only injunctive relief, a prospective plaintiff in a Y2K action shall send a written notice by certified mail (with either return receipt requested or other means of verification that the notice was sent) to each prospective defendant in that action. The notice shall provide specific and detailed information about—

(1) *the manifestations of any material defect alleged to have caused harm or loss;*

(2) *the harm or loss allegedly suffered by the prospective plaintiff;*

(3) *how the prospective plaintiff would like the prospective defendant to remedy the problem;*

(4) *the basis upon which the prospective plaintiff seeks that remedy; and*

(5) *the name, title, address, and telephone number of any individual who has authority to negotiate a resolution of the dispute on behalf of the prospective plaintiff.*

(b) *PERSON TO WHOM NOTICE TO BE SENT.*—The notice required by subsection (a) shall be sent—

(1) *to the registered agent of the prospective defendant for service of legal process;*

(2) *if the prospective defendant does not have a registered agent, then to the chief executive officer if the prospective defendant is a corporation, to the managing partner if the prospective defendant is a partnership, to the proprietor if the prospective defendant is a sole proprietorship, or to a similarly-situated person if the prospective defendant is any other enterprise; or*

(3) *if the prospective defendant has designated a person to receive prelitigation notices on a Year 2000 Internet Website (as defined in section 3(7) of the Year 2000 Information and Readiness Disclosure Act), to the designated person, if the prospective plaintiff has reasonable access to the Internet.*

(c) *RESPONSE TO NOTICE.*—

(1) *IN GENERAL.*—Within 30 days after receipt of the notice specified in subsection (a), each prospective defendant shall send by certified mail with return receipt requested to each prospective plaintiff a written statement acknowledging receipt of the notice, and describing the actions it has taken or will take to address the problem identified by the prospective plaintiff.

(2) *WILLINGNESS TO ENGAGE IN ADR.*—The written statement shall state whether the prospective defendant is willing to engage in alternative dispute resolution.

(3) *INADMISSIBILITY.*—A written statement required by this subsection is not admissible in evidence, under Rule 408 of the Federal Rules of Evidence or any analogous rule of evidence in any State, in any proceeding to prove liability for, or the inva-

lidity of, a claim or its amount, or otherwise as evidence of conduct or statements made in compromise negotiations.

(4) *PRESUMPTIVE TIME OF RECEIPT.*—For purposes of paragraph (1), a notice under subsection (a) is presumed to be received 7 days after it was sent.

(5) *PRIORITY.*—A prospective defendant receiving more than 1 notice under this section may give priority to notices with respect to a product or service that involves a health or safety related Y2K failure.

(d) *FAILURE TO RESPOND.*—If a prospective defendant—

(1) fails to respond to a notice provided pursuant to subsection (a) within the 30 days specified in subsection (c)(1), or

(2) does not describe the action, if any, the prospective defendant has taken, or will take, to address the problem identified by the prospective plaintiff,

the prospective plaintiff may immediately commence a legal action against that prospective defendant.

(e) *REMEDATION PERIOD.*—

(1) *IN GENERAL.*—If the prospective defendant responds and proposes remedial action it will take, or offers to engage in alternative dispute resolution, then the prospective plaintiff shall allow the prospective defendant an additional 60 days from the end of the 30-day notice period to complete the proposed remedial action or alternative dispute resolution before commencing a legal action against that prospective defendant.

(2) *EXTENSION BY AGREEMENT.*—The prospective plaintiff and prospective defendant may change the length of the 60-day remediation period by written agreement.

(3) *MULTIPLE EXTENSIONS NOT ALLOWED.*—Except as provided in paragraph (2), a defendant in a Y2K action is entitled to no more than one 30-day period and one 60-day remediation period under paragraph (1).

(4) *STATUTES OF LIMITATION, ETC., TOLLED.*—Any applicable statute of limitations or doctrine of laches in a Y2K action of which paragraph (1) applies shall be tolled during the notice and remediation period under that paragraph.

(f) *FAILURE TO PROVIDE NOTICE.*—If a defendant determines that a plaintiff has filed a Y2K action without providing the notice specified in subsection (a) or without awaiting the expiration of the appropriate waiting period specified in subsection (c), the defendant may treat the plaintiff's complaint as such a notice by so informing the court and the plaintiff in its initial response to the plaintiff. If any defendant elects to treat the complaint as such a notice—

(1) the court shall stay all discovery and all other proceedings in the action for the appropriate period after filing of the complaint; and

(2) the time for filing answers and all other pleadings shall be tolled during the appropriate period.

(g) *EFFECT OF CONTRACTUAL OR STATUTORY WAITING PERIODS.*—In cases in which a contract, or a statute enacted before January 1, 1999, requires notice of non-performance and provides for a period of delay prior to the initiation of suit for breach or repudiation of contract, the period of delay provided by contract or the

statute is controlling over the waiting period specified in subsections (c) and (d).

(h) *STATE LAW CONTROLS ALTERNATIVE METHODS.*—Nothing in this section supersedes or otherwise preempts any State law or rule of civil procedure with respect to the use of alternative dispute resolution for Y2K actions.

(i) *PROVISIONAL REMEDIES UNAFFECTED.*—Nothing in this section interferes with the right of a litigant to provisional remedies otherwise available under Rule 65 of the Federal Rules of Civil Procedure or any State rule of civil procedure providing extraordinary or provisional remedies in any civil action in which the underlying complaint seeks both injunctive and monetary relief.

(j) *SPECIAL RULE FOR CLASS ACTIONS.*—For the purpose of applying this section to a Y2K action that is maintained as a class action in Federal or State court, the requirements of the preceding subsections of this section apply only to named plaintiffs in the class action.

SEC. 8. PLEADING REQUIREMENTS

(a) *APPLICATION WITH RULES OF CIVIL PROCEDURE.*—This section applies exclusively to Y2K actions and, except to the extent that this section requires additional information to be contained in or attached to pleadings, nothing in this section is intended to amend or otherwise supersede applicable rules of Federal or State civil procedures.

(B) *NATURE AND AMOUNT OF DAMAGES.*—In all Y2K actions in which damages are requested, there shall be filed with the complaint a statement of specific information as to the nature and amount of each element of damages and the factual basis for the damages calculation.

(C) *MATERIAL DEFECTS.*—In any Y2K action in which the plaintiff alleges that there is a material defect in a product or service, there shall be filed with the complaint a statement of specific information regarding the manifestations of the material defects and the facts supporting a conclusion that the defects are material.

(d) *REQUIRED STATE OF MIND.*—In any Y2K action in which a claim is asserted on which the plaintiff may prevail only on proof that the defendant acted with a particular state of mind, there shall be filed with the complaint, with respect to each element of that claim, a statement of the facts giving rise to a strong inference that the defendant acted with the required state of mind.

SEC. 9. DUTY TO MITIGATE.

(A) *IN GENERAL.*—Damages awarded in any Y2K action shall exclude compensation for damages the plaintiff could reasonably have avoided in light of any disclosure or other information of which the plaintiff was, or reasonably should have been, aware, including information made available by the defendant to purchasers or users of the defendant's product or services concerning means of remedying or avoiding the Y2K failure involved in the action.

(b) *PRESERVATION OF EXISTING LAW.*—The duty imposed by this section is in addition to any duty to mitigate imposed by State law.

(c) *EXCEPTION FOR INTENTIONAL FRAUD.*—Subsection (a) does not apply to damages suffered by reason of the plaintiff's justifiable reliance upon an affirmative material misrepresentation by the de-

endant, made by the defendant with actual knowledge of its falsity, concerning the potential for Y2K failure of the device or system used or sold by the defendant that experienced the Y2K failure alleged to have caused the plaintiff's harm.

SEC. 10. APPLICATION OF EXISTING IMPOSSIBILITY OR COMMERCIAL IMPRACTICABILITY DOCTRINES.

In any Y2K action for breach or repudiation of contract, the applicability of the doctrines of impossibility and commercial impracticability shall be determined by the law in existence on January 1, 1999. Nothing in this Act shall be construed as limiting or impairing a party's right to assert defenses based upon such doctrines.

SEC. 11. DAMAGES LIMITATION BY CONTRACT.

In any Y2K action for breach or repudiation of contract, no party may claim, or be awarded, any category of damages unless such damages are allowed—

- (1) by the express terms of the contract; or*
- (2) if the contract is silent on such damages, by operation of State law at the time the contract was effective or by operation of Federal law.*

SEC. 12. DAMAGES IN TORT CLAIMS.

(a) IN GENERAL.—A party to a Y2K action making a tort claim, other than a claim of intentional tort arising independent of a contract, may not recover damages for economic loss unless—

- (1) the recovery of such losses is provided for in a contract to which the party seeking to recover such losses is a party, or*
- (2) such losses result directly from damage to tangible personal or real property caused by the Y2K failure involved in the action (other than damage to property that is the subject of the contract between the parties to the Y2K action or, in the event there is no contract between the parties, other than damage caused only to the property that experienced the Y2K failure), and such damages are permitted under applicable Federal or State law.*

(b) ECONOMIC LOSS.—For purposes of this section only, and except as otherwise specifically provided in a valid and enforceable written contract between the plaintiff and the defendant in a Y2K action, the term "economic loss" means amounts awarded to compensate an injured party for any loss, and includes amounts awarded for damages such as—

- (1) lost profits or sales;*
- (2) business interruption;*
- (3) losses indirectly suffered as a result of the defendant's wrongful act or omission;*
- (4) losses that arise because of the claims of third parties;*
- (5) losses that must be pled as special damages; and*
- (6) consequential damages (as defined in the Uniform Commercial Code or analogous State commercial law).*

(c) CERTAIN OTHER ACTIONS.—A person liable for damages, whether by settlement or judgment, in a civil action to which this Act does not apply because of section 4(c) whose liability, in whole or in part, is the result of a Y2K failure may, notwithstanding any other provision of this Act, pursue any remedy otherwise available

under Federal or State law against the person responsible for that Y2K failure to the extent of recovering the amount of those damages.

SEC. 13. STATE OF MIND; BYSTANDER LIABILITY; CONTROL.

(a) *DEFENDANT'S STATE OF MIND.*—In a Y2K action other than a claim for breach or repudiation of contract, and in which the defendant's actual or constructive awareness of an actual or potential Y2K failure is an element of the claim, the defendant is not liable unless the plaintiff establishes that element of the claim by the standard of evidence under applicable State law in effect on the day before January 1, 1999.

(b) *LIMITATION ON BYSTANDER LIABILITY FOR Y2K Failures.*—

(1) *IN GENERAL.*—With respect to any Y2K action for money damages in which—

(A) the defendant is not the manufacturer, seller, or distributor of a product, or the provider of a service, that suffers or causes the Y2K failure at issue,

(B) the plaintiff is not in substantial privity with the defendant, and

(C) the defendant's actual or constructive awareness of an actual or potential Y2K failure is an element of the claim under applicable law,

the defendant shall not be liable unless the plaintiff, in addition to establishing all other requisite elements of the claim, proves, by the standard of evidence under applicable State law in effect on the day before January 1, 1999, that the defendant actually knew, or recklessly disregarded a known and substantial risk, that such failure would occur.

(2) *SUBSTANTIAL PRIVACY.*—For purposes of paragraph (1)(B), a plaintiff and a defendant are in substantial privity when, in a Y2K action arising out of the performance of professional services, the plaintiff and the defendant either have contractual relations with one another or the plaintiff is a person who, prior to the defendant's performance of such services, was specifically identified to and acknowledged by the defendant as a person for whose special benefit the services were being performed.

(3) *CERTAIN CLAIMS EXCLUDED.*—For purposes of paragraph (1)(C), claims in which the defendant's actual or constructive awareness of an actual or potential Y2K failure is an element of the claim under applicable law do not include claims for negligence but do include claims such as fraud, constructive fraud, breach of fiduciary duty, negligent misrepresentation, and interference with contract or economic advantage.

(c) *CONTROL NOT DETERMINATIVE OF LIABILITY.*—The fact that a Y2K failure occurred in an entity, facility, system, product, or component that was sold, leased, rented, or otherwise within the control of the party against whom a claim is asserted in a Y2K action shall not constitute the sole basis for recovery of damages in that action. A claim in a Y2K action for breach or repudiation of contract for such a failure is governed by the terms of the contract.

(d) *PROTECTIONS OF THE YEAR 2000 INFORMATION AND READINESS DISCLOSURE ACT APPLY.*—The protections for the exchanges of information provided by section 4 of the Year 2000 Information and

Readiness Disclosure Act (Public Law 105–271) shall apply to any Y2K action.

SEC. 14. APPOINTMENT OF SPECIAL MASTERS OR MAGISTRATE JUDGES FOR Y2K ACTIONS.

Any district court of the United States in which a Y2K action is pending may appoint a special master or a magistrate judge to hear the matter and to make findings of fact and conclusions of law in accordance with Rule 53 of the Federal Rules of Civil Procedure.

SEC. 15. Y2K ACTIONS AS CLASS ACTIONS.

(a) MATERIAL DEFECT REQUIREMENT.—A Y2K action involving a claim that a product or service is defective may be maintained as a class action in Federal or State court as to that claim only if—

- (1) it satisfies all other prerequisites established by applicable Federal or State law, including applicable rules of civil procedure; and*
- (2) the court finds that the defect in a product or service as alleged would be a material defect for the majority of the members of the class.*

(b) NOTIFICATION.—In any Y2K action that is maintained as a class action, the court, in addition to any other notice required by applicable Federal or State law, shall direct notice of the action to each member of the class, which shall include—

- (1) a concise and clear description of the nature of the action;*
- (2) the jurisdiction where the case is pending; and*
- (3) the fee arrangements with class counsel, including the hourly fee being charged, or, if it is a contingency fee, the percentage of the final award which will be paid, including an estimate of the total amount that would be paid if the requested damages were to be granted.*

(c) FORUM FOR Y2K CLASS ACTIONS.—

(1) Jurisdiction.—Except as provided in paragraph (2), the district courts of the United States shall have original jurisdiction of any Y2K action that is brought as a class action.

(2) EXCEPTIONS.—The district courts of the United States shall not have original jurisdiction over a Y2K action brought as a class action if—

- (A)(i) a substantial majority of the members of the proposed plaintiff class are citizens of a single State;*
- (ii) the primary defendants are citizens of that State; and*
- (iii) the claims asserted will be governed primarily by the laws of that State;*

(B) the primary defendants are States, State officials, or other governmental entities against whom the district courts of the United States may be foreclosed from ordering relief;

(C) the plaintiff class does not seek an award of punitive damages, and the amount in controversy is less than the sum of \$10,000,000 (exclusive of interest and costs), computed on the basis of all claims to be determined in the action; or

(D) there are less than 100 members of the proposed plaintiff class.

A party urging that any exception described in subparagraph (A), (B), (C), or (D) applies to an action shall bear the full burden of demonstrating the applicability of the exception.

(3) PROCEDURE IF REQUIREMENTS NOT MET.—

(A) DISMISSAL OR REMAND.—*A United States district court shall dismiss, or, if after removal, strike the class allegations and remand, any Y2K action brought or removed under this subsection as a class action if—*

(i) the action is subject to the jurisdiction of the court solely under this subsection; and

(ii) the court determines the action may not proceed as a class action based on a failure to satisfy the conditions of Rule 23 of the Federal Rules of Civil Procedure.

(B) AMENDMENT; REMOVAL.—*Nothing in paragraph (A) shall prohibit plaintiffs from filing an amended class action in Federal or State court. A defendant shall have the right to remove such an amended class action to a United States district court under this subsection.*

(C) PERIOD OF LIMITATIONS TOLLED.—*Upon dismissal or remand, the period of limitations for any claim that was asserted in an action on behalf of any named or unnamed member of any proposed class shall be deemed tolled to the full extent provided under Federal law.*

(D) DISMISSAL WITHOUT PREJUDICE.—*The dismissal of a Y2K action under subparagraph (A) shall be without prejudice.*

(d) EFFECT ON RULES OF CIVIL PROCEDURE.—*Except as otherwise provided in this section, nothing in this section supersedes any rule of Federal or State civil procedure applicable to class actions.*

SEC. 16. APPLICABILITY OF STATE LAW.

Nothing in this Act shall be construed to affect the applicability of any State law that provides stricter limits on damages and liabilities, affording greater protection to defendants in Y2K actions, than are provided in this Act.

SEC. 17. ADMISSIBLE EVIDENCE ULTIMATE ISSUE IN STATE COURTS.

Any party to a Y2K action in a State court in a State that has not adopted a rule of evidence substantially similar to Rule 704 of the Federal Rules of Evidence may introduce in such action evidence that would be admissible if Rule 704 applied in that jurisdiction.

SEC. 18. SUSPENSION OF PENALTIES FOR CERTAIN YEAR 2000 FAILURES BY SMALL BUSINESS CONCERNS.

(a) DEFINITIONS.—*In this section—*

(1) the term “agency” means any executive agency, as defined in section 105 of title 5, United States Code, that has the authority to impose civil penalties on small business concerns;

(2) the term “first-time violation” means a violation by a small business concern of a federally enforceable rule or regulation (other than a Federal rule or regulation that relates to the safety and soundness of the banking or monetary system or for the integrity of the National Securities markets, including protection of depositors and investors) caused by a Y2K failure if

that Federal rule or regulation has not been violated by that small business concern within the preceding 3 years; and

(3) the term “small business concern” has the same meaning as a defendant described in section 5(b)(2)(B).

(b) ESTABLISHMENT OF LIAISONS.—Not later than 30 days after the date of enactment of this Act, each agency shall—

(1) establish a point of contact with the agency to act as a liaison between the agency and small business concerns with respect to problems arising out of Y2K failures and compliance with Federal rules or regulations; and

(2) publish the name and phone number of the point of contact for the agency in the Federal Register.

(c) GENERAL RULE.—Subject to subsections (d) and (e), no agency shall impose any civil money penalty on a small business concern for a first-time violation.

(d) STANDARDS FOR WAIVER.—An agency shall provide a waiver of civil money penalties for a first-time violation, provided that a small business concern demonstrates, and the agency determines, that—

(1) the small business concern previously made a reasonable good faith effort to anticipate, prevent, and effectively remediate a potential Y2K failure;

(2) a first-time violation occurred as a result of the Y2K failure of the small business concern or other entity, which significantly affected the small business concern’s ability to comply with a Federal rule or regulation;

(3) the first-time violation was unavoidable in the face of a Y2K failure or occurred as a result of efforts to prevent the disruption of critical functions or services that could result in harm to life or property;

(4) upon identification of a first-time violation, the small business concern initiated reasonable and prompt measures to correct the violation; and

(5) the small business concern submitted notice to the appropriate agency of the first-time violation within a reasonable time not to exceed 5 business days from the time that the small business concern became aware that the first-time violation had occurred.

(e) EXCEPTIONS.—An agency may impose civil money penalties authorized under Federal law on a small business concern for a first-time violation if—

(1) the small business concern’s failure to comply with Federal rules or regulations resulted in actual harm, or constitutes or creates an imminent threat to public health, safety, or the environment; or

(2) the small business concern fails to correct the violation not later than 1 month after initial notification to the agency.

(f) EXPIRATION.—This section shall not apply to first-time violations caused by a Y2K failure occurring after December 31, 2000.

And the Senate agree to the same.

From the Committee on the Judiciary:

HENRY HYDE,
F. JAMES SENSENBRENNER, Jr.,
BOB GOODLATTE,

From the Committee on Commerce, for consideration of
section 18 of the Senate amendment:

TOM BLILEY,
MICHAEL G. OXLEY,

Managers on the Part of the House.

From the Committee on Commerce, Science, and Transportation:

JOHN MCCAIN,
TED STEVENS,
CONRAD BURNS,
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RON WYDEN,

From the Committee on the Judiciary:

ORRIN HATCH,
STROM THURMAN,

From the Special Committee on the Year 2000 Technology
Problem:

ROBERT F. BENNETT,
CHRISTOPHER DODD,

Managers on the Part of the Senate.

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and Senate at the conference on the disagreeing vote of the two Houses on the amendment of the Senate to the bill (H.R. 775), to establish certain procedures for civil actions brought for damages relating to the failure of any device or system to process or otherwise deal with the transition from the year 1999 to the year 2000, and for other purposes, submit the following joint statement to the House and Senate in explanation of the effects of the action agreed upon by the managers and recommended in the accompanying report.

The House recedes from its disagreement to the amendment of the Senate with an amendment that is a substitute for the House bill and the Senate amendment. The differences between the House bill, the Senate amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clerical changes.

DEFINITION OF Y2K ACTION

The House and Senate versions had different definitions of Y2K action. The conferees agreed to a definition that makes the intended scope of the Act clear. The modified definition includes actions that involve both actual and potential failures that could occur or cause harm before January 1, 2003. The conferees want to ensure that the Act applies to those cases involving questions such as the determination of liability to shareholders or responsibility for the costs of remediation even when there is no actual Y2K failure. Additionally, the conferees note that there have already been many cases filed involving Y2K issues in which there has been no actual failure but only potential, prospective, or anticipated failures. The conferees intend to include these types of cases within the scope of the Act.

FINANCIAL INSTITUTIONS

The Senate amendment to H.R. 775 contained an amendment by Senator Inhofe, incorporating language proposed by Senator Hollings, to ensure that a homeowner cannot be foreclosed upon due to a Y2K failure. The conferees agree that the actual language adopted was broader than the intent stated by Senator Hollings, and after consultation with the Federal Deposit Insurance Corporation, and the House Committee on Banking and Financial Services and the Senate Committee on Banking, Housing, and Urban Affairs, the conferees have agreed to modify section 4(h) of the Senate amendment. It is the conferees' intent that the section, as modified, will provide the protections proposed by Senator Hollings without affecting all financial transactions, including those which do not involve either a consumer/homeowner or an actual Y2K failure.

The modified language limits the applicability of the protections to residential mortgages. It requires the consumer to provide notice of the Y2K failure and of the consumer's inability to timely fulfill his or her obligation to pay. The modified language also limits the applicability of this subsection to transactions occurring between December 16, 1999, and March 15, 2000.

OTHER MATTERS

The conferees agree that while other differences exist between the House bill and the Senate amendment, many of these differences do not reflect a difference in intent. For example, the House bill contained a definition of "damages" while the Senate amendment does not. The conference substitute does not include a definition of "damages" because the conferees agree that the House definition is self-evident in actual practice and under State law, so that the definition is unnecessary.

APPLICATION OF ACT

The conferees agreed to add language to section 4, relating to the scope of application of the Act, to make it clear that in any Y2K action that arises under the securities laws, the provisions of the Act (other than section 13(b)) do not apply.

Y2K UPSET PROTECTIONS

The conference substitute includes the Inhofe amendment with modifications. The purpose of the Inhofe amendment is to waive penalties for limited, exceptional and temporary noncompliance with federally enforceable measurement, monitoring, or reporting requirements, for which there was otherwise no violation of the underlying substantive federally enforceable regulation. For example, in the environmental arena, because of a Y2K failure, a facility's monitoring or reporting equipment fails to operate properly; the facility continues to function normally and all applicable pollution standards or limits are otherwise met. In that situation, the facility would get the benefit of the waiver provided it met the conditions set forth under this section. However, if, aside from the monitoring or reporting requirements, the facility has violated the underlying federally enforceable requirement to which the monitoring or reporting requirement related, or if there was actual or imminent harm to the public health, safety, or the environment, the facility would not get the benefit of the defense.

The phrase "measurement, monitoring, or reporting" broadly covers a range of federal requirements, but not every term need apply to every federal program. For example, the term "measurement" is not intended to apply to federal environmental statutes.

PROPORTIONATE LIABILITY

Prior to the conference, the House version of the Proportionate Liability section provided that a defendant would only be responsible for that portion of a Y2K claim that corresponds to the defendant's percentage of responsibility for the harm experienced by the plaintiff. This provision would supersede existing laws imposing joint and several liability on defendants. The Senate amendment was substantially similar in the scope of the general rule but added several exceptions to it. The conference substitute incorporates a number of modifications, as follows:

Under the original Senate formulation, in most circumstances, a defendant would only be proportionately liable for the damages for which the defendant was responsible. The proportion of responsibility would be based as a "percentage of the total fault of all persons, including the plaintiff, who caused or contributed to the total loss incurred by the plaintiff." If alleged by the plaintiff, the fact-finder would also have to make a determination of whether the defendant "acted with specific intent to injure the plaintiff" or knowingly committed fraud. If the fact-finder answers either of those two questions in the affirmative, then that individual defendant will remain jointly and severally liable for the plaintiff's damages. Subsection (c)(2)(A) defines the circumstance under which a defendant commits knowing fraud for purposes of this section. Subsection (c)(2)(B) makes clear that simply reckless conduct by the defendant is not enough to trigger the knowing fraud definition of this section.

The other two exceptions to proportional liability contained within the original Senate amendment deal with what happens when there is an uncollectible share of liability. The original formulation of the uncollectible share exception provided that a defend-

ant would be liable for an uncollectible share in proportion to that defendant's total responsibility but the defendant's total liability for the uncollectible share could not exceed 50 percent of that defendant's proportionate share. The second exception deals with when there is an uncollectible share and "the plaintiff is an individual whose recoverable damages under the final judgment are equal to more than 10 percent of the net worth of the plaintiff" and the plaintiff's overall net worth is less than \$200,000. In the second case, all other defendants remain entirely jointly and severally liable for the uncollectible share.

The additional amendment proposed by the Senate and agreed to by the House conferees modifies the general rule for uncollectible shares. Under this amendment, a defendant would be liable for an additional 100 percent of its proportionate share as applied to the uncollectible share, rather than being liable for only up to 50 percent of the defendant's proportionate share. In addition, the amendment holds a defendant liable for an additional 50 percent of that defendant's proportionate share of the uncollectible amounts if that defendant acted with reckless disregard for the likelihood that the defendant's acts would cause the harm or loss suffered by the plaintiff. The amendment also permits certain plaintiffs who are individual consumers and who bring individual suits, rather than class actions, to hold other defendants liable for uncollectible shares consistent with state law.

The original Senate amendment also contains provisions dealing with settlement discharge and a defendant's right to contribution from fellow defendants. Subsection (e) indicates that a defendant may settle a Y2K action at any time before a final verdict or judgment is reached and such a defendant will be discharged from all contribution claims brought by other persons. The amendment also makes clear that a defendant who, because of the exceptions contained in the amendment, becomes jointly and severally liable for a portion of the plaintiff's damages, may recover contribution from any other person who would have been liable for the plaintiff's damages. The determination of a claim for contribution must be based on the percentage of responsibility of the defendant "against whom a claim for contribution is made."

The conference agreement makes clear that State laws are not preempted. This section does not preempt State statutes that limit a defendant's liability to a lesser amount than that determined under this section or otherwise provide greater protection to a defendant from joint and several liability.

The general intent behind this section is to impose proportional liability upon a defendant rather than joint and several liability. The conferees are of the view, except for limited exceptions, that it is inherently unfair to hold a defendant that has limited culpability liable for the entire amount of the judgment obtained by the plaintiff. This section does not allow defendants to transfer the amount of their responsibility to other parties. Rather, this section recognizes and holds defendants liable for the actual amount of harm they actually caused, and for orphan shares of individual consumers.

The original exceptions contained in the Senate amendment as well as the subsequent Senate amendment agreed to by the House

conferees, provides a limited escape route for plaintiffs that could be grossly disadvantaged by a pure formulation of proportional liability. These exceptions only apply in the context of when the defendant engaged in especially egregious conduct or when the damages awarded to the plaintiff may not be entirely recoverable due to a defendant's insolvency or other problem in paying.

DUTY TO MITIGATE

Prior to the conference, the House version of the Duty to Mitigate section stated the duty of plaintiffs to avoid damages which "could reasonably have been avoided in light of any disclosure or other information" including information made available by the defendant. The Senate Amendment was substantially identical except for its reference to "Y2K action" rather than the House version's "Y2K claim." The House conferees agreed to recede to the Senate formulation. The Senate proposed an additional amendment that was agreed to by the House.

The additional amendment kept the Senate formulation substantially intact but added 2 new subsections. Subsection (b) includes the plaintiffs duty to mitigate but makes clear that the Federal mitigation requirement is in addition to any State mitigation requirement. Subsection (c) provides an exception to the plaintiff's affirmative duty to mitigate where the plaintiff has relied on the defendant's fraudulent representations regarding the Y2K readiness of the product that is the basis of the plaintiff's suit.

This provision is intended to further this legislation's fundamental goal of Y2K remediation. This section affirms State law that requires plaintiffs to take reasonable steps to limit their damages. The amendments agreed to by the conferees provide that in limited circumstances where the defendants are engaged in egregious conduct, a plaintiff will be relieved of this affirmative duty.

Section 9 affirms, at the Federal level, the Uniform Commercial Code provisions addressing the responsibility of plaintiffs to limit their damages by obtaining other conforming goods (UCC § 2-712, duty to "cover") and limitations on a buyer's consequential damages to those which could not have "reasonably" been prevented. These concepts establish an independent affirmative responsibility on buyers. The basis for this responsibility to avoid "losses that reasonably could have been prevented" arises without reference to any action by the seller/defendant. Section 9, as amended by the conferees, recognizes the unprecedented risk attaching to Y2K and accordingly adds to these established Uniform Commercial Code principles in one significant way. The section extends the concept of mitigation to events occurring prior to the actual tort or contractual breach.

ECONOMIC LOSS

Both the House and Senate bills included language to codify the economic loss rule. That rule states that a party who has suffered only economic damages must generally sue to recover those damages under contract, not tort, law. The House version, however excepted all intentional torts from the scope of the rule while the Senate version did not expressly address intentional torts. The Senate and House agree to an amendment that clarifies this excep-

tion to the economic loss rule. Under the conference substitute, the economic loss rule applies to all torts except intentional torts arising independent of a contract. This codifies the rapidly emerging trend in State law to apply the economic loss rule to bar intentional tort claims, such as fraud claims, where such claims are intrinsic to, or indistinguishable from, an underlying contractual dispute between the parties. Simply put, breach of contract, intentional or otherwise, does not generally give rise to a tort claim; it is simply breach of contract. If, however, there is an intentional tort that is extraneous to the underlying contract claim, this section will not limit a party's ability to recover economic losses under applicable law.

WARRANTY AND CONTRACT PRESERVATION

The intent of section 4(d) of the conference substitute is to enhance business certainty and discourage frivolous lawsuits that attempt to undermine established contractual relationships. This section makes clear that contract terms and provisions shall be fully enforced so contracting entities have the benefit of their bargains. The mere fact that a Y2K-related problem arises should not cause courts to disregard or diminish enforceable contract terms unless those terms are directly contrary to a specific statute. Thus, exclusions of liability, disclaimers of warranty and similar limitations will be recognized and enforced as written. The conferees, however, agreed to an amendment that clarifies that this section does not make enforceable contract terms that are otherwise unenforceable under State law doctrines of unconscionability, including adhesion, recognized as of January 1, 1999 under controlling judicial precedent.

APPLICATION OF IRDA

The conferees agreed to an amendment to section 13 of the Senate amendment to make it clear that the protection for exchanges of information provided by the Year 2000 Information and Readiness Disclosure Act apply to Y2K actions under the Act.

TECHNICAL CHANGE TO SECTION 16 (THE ALLARD AMENDMENT)

The conference substitute contains a technical change to section 16 which will prevent any potential misinterpretation of this section. The intent of section 16, which is the text of an amendment offered to S. 96 by Senator Allard, is to clarify that nothing in this Act will preempt or prevent the applicability of any State law which imposes more restrictive limits on damages and liabilities than the limits provided for in this Act. The original wording, "greater limits," left room for confusion and possible misinterpretation by providing an opportunity for argument that any State law with higher limits on damages and liabilities would supersede this Act. Because this Act supersedes any State law which allows a plaintiff to pursue or collect any amount in damages or liabilities which are above and beyond the amounts provided for in this Act, the conferees want to clarify the wording of this section. The new wording, "stricter limits," coupled with the language "affording greater protection to defendants in Y2K actions" than would be af-

forded under the Act, ensures that this Act grants deference only to State laws which cap damages and liabilities at a lower amount than provided for in this Act.

From the Committee on the Judiciary:

HENRY HYDE,
F. JAMES SENSENBRENNER, Jr.,
BOB GOODLATTE,

From the Committee on Commerce, for consideration of section 18 of the Senate amendment:

TOM BLILEY,
MICHAEL G. OXLEY,

Managers on the Part of the House.

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JOHN MCCAIN,
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From the Committee on the Judiciary:

ORRIN HATCH,
STROM THURMOND,

From the Special Committee on the Year 2000 Technology Problem:

ROBERT F. BENNETT,
CHRISTOPHER DODD,

Managers on the Part of the Senate .

